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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN RE: 5-YEAR PERMIT RENEWAL, CO-OP MINING COMPANY, BEAR CANYON MINE, EMERY COUNTY, UTAH	**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPELLANTS' REQUEST FOR HEARING EXAMINER AND IN OPPOSITION TO COLLATERAL ESTOPPEL** **CAUSE NO. ACT/015/025** **Docket No. 95-025**

Castle Valley Special Service District ("Castle Valley"), North Emery Water Users Association ("NEWUA") and Huntington-Cleveland Irrigation Company ("Huntington-Cleveland") (collectively, "Appellants"), by and through their respective attorneys, Jeffrey W. Appel and W. Herbert McHarg of Appel & Warlaumont, and J. Craig Smith, David B. Hartvigsen, and Scott Ellsworth of Nielsen & Senior, respectfully submit this

Supplemental Memorandum in Support of Appellants' Joint Objection to Renewal, Appeal, and Request for Hearing of the Division of Oil, Gas and Mining ("Division") determination to approve renewal of Co-Op Mining Company's ("Co-Op") Bear Canyon Mine permit (ACT/015/025) dated August 11, 1997. This Supplemental Memorandum is limited to the issues of whether Water Users objections are barred by collateral estoppel and whether a hearing examiner should be appointed by the Board, pursuant to the Order of this Board dated October 15, 1997.

I. WATER USERS' OBJECTIONS ARE NOT BARRED BY COLLATERAL ESTOPPEL AS THESE ISSUES WERE ADJUDICATED ONLY IN REGARDS TO THE TANK SEAM

The objections raised by Appellants are not barred by the doctrine of collateral estoppel. The issues before the Board in this matter are supported by new evidence and relate to the Bear Canyon Mine Permit renewal -- not to the expansion of mining into the Tank seam. The hydrologic effects of mining in the Blind Canyon Seam have never been completely and fairly litigated, as is required in order for collateral estoppel to apply. Furthermore, findings of fact and conclusions of law that were unnecessary to the resolution of the Tank seam action cannot now collaterally estop Appellants in this current action.

(a). Collateral Estoppel Does Not Apply To This Action Involving the Blind Canyon Seam That Necessarily Requires The Determination Of New Evidence

Collateral estoppel has no application to an action that is based on new and different facts and evidence. The Utah Supreme

Court has stated:

> Although the court in the prior action had found from the evidence presented to it that justice and equity required severance and in the ordinary case where a judgment has been granted on issues which have been litigated between the same parties such issues under the doctrine of collateral estoppel cannot be relitigated in a subsequent but different cause of action, this doctrine does not apply here because that doctrine does not have any bearing on the question here presented. That doctrine only applies where a question of fact essential to and determinative of the judgement is actually litigated and determined by a valid or final judgement which is conclusive as between the parties to a subsequent action on a different cause of action. Since this action is based on a new and different ordinance which necessarily requires the determination of essentially different facts from those determined in the previous action that doctrine can have no application to this case.

In re Town of W. Jordan, 326 P.2d 105 (Utah 1958) (emphasis added).

Four criteria must be met for collateral estoppel to apply:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party to the prior adjudication?
4. Was the issue in the first case, competently, fully, and fairly litigated?

Stumph v. Church, 740 P.2d 820, 822 (Utah App. 1987) (citations omitted). The burden of proving that collateral estoppel applies is on the party asserting the doctrine. See Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993). Co-Op is unable to meet this burden.

The issues presently before the Board requires sharp focus on the first and fourth elements. These elements were addressed in Schaer v. State By & Through Utah Dept., 657 P.2d 1337 (Utah 1983) in relation to issues regarding access property. The Schaer Court had to determine "whether the issues actually litigated in the

first action are precisely the same as those raised in the present action." Schaer at 1341 (citations omitted). In reaching the determination that the precise issue was not actually raised and litigated, the Court stated that the lower court's findings of fact did not purport to rule conclusively on the issue "for all time," and stated that "there is nothing in its findings to preclude another court twelve years later from finding that access is now reasonable." Id. Comparably, there is nothing in the findings of the Division, the Board, or the Supreme Court based on outdated evidence to preclude this Board from now reaching different findings in this action that is based on new evidence.

The issues actually litigated in the Tank seam action were not precisely the same as those in the action now before the Board. The current appeal to the Board involves different issues because they are premised upon new evidence and evidence that relates to distinct and different areas. The issues in the August 22, 1994 matter were noticed for and related only to extension of mining into the Tank seam, whereas the issues in the current appeal dated September 10, 1997 relate to mining in the Blind Canyon seam.

Co-Op's arguments and the rulings of the Division, the Supreme Court, and this Board further support the concept that the evidence necessary for a proper determination of the current action would be of a different character.

Co-Op argued in its "Closing Argument," December 17, 1994:

> Petitioners are only entitled to a hearing on the reason for DOGM's decision to approve the significant revision. Petitioners did not request a NOV [Notice of Violation] or other agency action based on CWM's past mining

> activity. Petitioners did not request, are not entitled to, and did not receive a hearing on whether to approve or modify CWM's [Co-Op] existing permit. [citation omitted] Under R645-300-211 and the relief Petitioners request in their Request for Agency Action, the only question is whether CWM satisfied the requirements for approving the significant revision to permit mining the Tank Seam.

(R. 747)(emphasis added). At the beginning of the hearing, the Board stated:

> However, I want to point out that in the Board's deliberations, that the issue before us today relates to the significant revision of the mining permit issued to Co-op in July of this year, and the Board in its deliberations determined that we would only consider evidence as it relates to the impact of mining of the Tank Seam.
>
> Just for the record, I want to read in how this was noticed, so that everybody understands the frame work with which we'll conduct this hearing. The purpose of this proceeding will be for the Board to consider the objection of the petitioner to the Division for determination of approving Co-op Mining Company's significant revision to extend its mining operations in to the Tank Seam. That also is what appears in the petitioner's motion for this hearing. And so that's how we're going to conduct the hearing, by narrowing that focus as it relates to the Tank Seam and impact of mining on that Tank Seam. Okay.

Brief of Petitioners at 12 (Tr. 29-30) (R. 114-115) (emphasis added).

Thus, the issue in the first appeal related only to the impact of mining of the Tank seam. The Supreme Court stated in its December 31, 1996 Decision:

> The validity of the existing permit [to mine the Blind Canyon seam] was not at issue in the hearings held on the revision request. A renewal application for that permit was later submitted to the Division in separate proceedings. Water Users have expressed concern that some of the Board's findings and conclusions would collaterally estop them in the permit renewal hearing, and this appears to be the primary motivation for contesting those findings and conclusions. However, whether the challenged findings would collaterally estop

> Water Users on any issues in the permit revision proceeding can be decided only in the proceeding in which the issue is raised. We therefore do not address that issue here.

Utah Supreme Court Decision at 2 (emphasis added). Furthermore, this Board in its Order Granting Temporary Relief and Remanding for an Informal Conference dated February 23, 1996 stated:

> The Board does not express any opinion at this time as to the merits, if any, of the Objectors' various contentions, or as to legal issues raised by the Mining Company in its Memorandum in Opposition concerning the alleged res judicata and/or collateral estoppel effect of any prior ruling by the Board concerning the Bear Canyon Mine. . . . All of the foregoing issues shall be considered in the first instance by the Division, if they are raised at the informal conference requested by the Objectors, so they are not yet ripe for Board review and/or action.

Board Order at 4. The Division rejected Co-Op's collateral estoppel claim. Co-Op is now attempting to collaterally attack this Division ruling. However, Co-Op did not appeal this Division ruling to the Board and therefore the ruling must stand.

The above statements of Co-Op Mining Company, the Division, this Board, and the Utah Supreme Court confirm that the facts and evidence involved in the Tank seam action were different from the new facts and evidence relevant to the Blind Canyon seam. Therefore, collateral estoppel may not apply.

(b). Collateral Estoppel Does Not Apply To The Findings of Fact And Conclusions Of Law That Were Unnecessary To The Resolution Of The Tank Seam Action

The Utah Supreme Court has stated that collateral estoppel does not apply to findings of fact and conclusions of law that were not necessary to the resolution of a particular action. In Stumph v. Church, 740 P.2d 820 (Utah App. 1987), the plaintiffs

feared that certain unnecessary rulings would be binding in subsequent proceedings by virtue of the doctrine of collateral estoppel. Stumph at 822. The Court stated that "[c]ollateral estoppel precludes relitigation of an issue only if 'the issue actually litigated in the first suit must have been essential to the resolution of that suit.'" Id. (citations omitted) (emphasis added). Although the Court deferred to the trial court for proceedings on the remainder of the case for consideration of whether collateral estoppel would apply, the Court held that if the findings were unnecessary for resolution of the issue, they would not be binding in subsequent proceedings. Id.

This point was also addressed in Cox Corporation v. Dugger, 583 P.2d 96 (Utah 1978). In Cox, the plaintiff alleged certain claims against the defendant in a past action. The defendant asserted that collateral estoppel barred the plaintiff's current action, that involved different claims, because the same determinative issue was resolved in the past action. The Cox Court held that collateral estoppel did not apply because the issue in the current action -- although addressed in the past action -- was not an issue essential to and determinative of the judgment in the past action.

Similarly, this Board has issued findings that were unnecessary to the resolution of the Tank Seam issue -- the only issue properly before the Board. The Board itself stated that:

> Co-Op's application for Significant Permit Revision involved only a proposal to mine the Tank Seam. Co-Op's current operations in the Blind Canyon seam are authorized under the terms of Co-Op's existing permit,

which has not been challenged in this proceeding. (Order, Conclusion of Law, ¶ 4, emphasis added) (R. 808).

The Board therefore does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area. (Order, Conclusion of Law, ¶ 6) (R. 809).

Nevertheless, in that same Order, this Board ventured outside its acknowledged jurisdictional scope and incorporated findings of fact and conclusions of law concerning the hydrologic effect and impacts of mining in the Blind Canyon Seam (Findings 42 through 53 and Conclusions of Law 6 through 9). This Board reasoned only that "[b]ecause the parties devoted a substantial portion of their evidence to the hydrologic effects of mining in the Blind Canyon seam, the Board feels obligated to make findings of fact concerning this issue." Board Order at 13 (emphasis added).

There is no standard under Utah law that requires the Board to reach findings unnecessary to the issues noticed and litigated merely because of "feeling obligated" to do so. Utah law does require, however, that findings be limited to the issues noticed and fairly and completely litigated, and necessary to the resolution of the action.

II. THIS BOARD SHOULD EXERCISE ITS AUTHORITY TO APPOINT A NEUTRAL HEARING EXAMINER

The Board should appoint an unbiased, neutral hearing examiner that is trained in hydrology, geology, and other related disciplines to conduct the hearing, to take evidence, and to recommend findings of fact and conclusions of law to the Board. Authority to make such an appointment is found under section 40-6-

10(6) of the Utah Code and R641-113-100 of the Utah Administrative Code. Obviously, this person must come from outside the Division. The Utah Administrative Code R645-300-212.100 requires that no person who presided at the Informal Conference may preside at the Board's hearing or participate in the decision.

Utah law provides for the appointment of "special masters." Rule 53 of the Utah Rules of Civil Procedure states:

> (a) Appointment and compensation. Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rules. As used in these rules the word "master" includes a referee, an auditor, and an examiner.

U.R.C.P. 53(a); See also Plumb v. State, 809 P.2d 734 (Utah 1990) (involving the scope of the trial court's appointment of a special master to assist in resolving technical issues).

This Board should appoint a hearing examiner to assist in hearing, evaluating, and resolving the many technical hydro-geologic issues on an expert and impartial basis. At the Informal Conference, Appellants' experts and Co-Op's experts presented much new technical evidence. The Division did not adequately consider this new evidence in reaching its unsupported and superficial findings. Instead, the Division treated all "facts" as established and essentially duplicated its decision on the Tank seam issue. The new evidence involved in this request for agency action requires expert consideration and is worthy of a fresh, hard look.

The appointment of a hearing examiner, who has not been involved in these issues previously, not only provides a fresh look

by a person with expertise but also saves the Board considerable time. Rather than the Board being required to participate in the entire hearing, a hearing that is expected to take three (3) or more days, the matter would instead be tried before the hearing examiner who will then make recommended findings to the Board. Only those findings to which a party takes exception must be heard and considered by the Board. This should take only one (1) day or less. The Board's time commitment will therefore be greatly reduced.

Without a hearing examiner the Board will be without the expertise in hydrology and geology that this matter demands. The Board cannot properly draw upon any Division personnel who were involved in the Division decision which is the subject of this appeal. Therefore, in the absence of a hearing examiner, this Board will be left to wade through time consuming and highly technical evidence and testimony on its own. The statutes and rules allowing the appointment of expert hearing examiners are precisely designed for this situation. The appointment of an expert hearing examiner will save this Board time and provide it with valuable expertise and unbiased interpretation of highly technical information.

III. CONCLUSION

Therefore, Appellants jointly request that this Board (1) find that collateral estoppel does not apply, and (2) appoint a hearing examiner.

Respectfully submitted this 14th day of November, 1997.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 1997, I caused a true and correct copy of the foregoing Supplemental Memorandum in Support of Appellants' Request for Hearing Examiner and in Opposition to Collateral Estoppel to be mailed, postage pre-paid, to the following:

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